United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4087 ~~74-2396~~

United States Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE GREASE COMPANY and THEATRE NOW, INC.,
Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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P/S

BRIEF FOR
THE GREASE COMPANY and THEATRE NOW, INC.

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AUTHORITIES CITED

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BRIEF FOR
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Statement of the Issues Presented

1. Whether substantial evidence on the record as a whole supports the Board's finding that Joseph F. Doucette, Sr., was an employee within the meaning of the Act and, if not, whether respondents violated the Act by discharging Doucette.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Doucettes were discharged in violation of Section 8(a)(3) and (1) of the Act because of Doucette, Sr.'s attendance at grievance meetings.

3. Whether substantial evidence on the record as a whole supports the Board's finding that The Grease Company and Theatre Now, Inc. are joint employers under the Act.

Statement of the Case

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, to enforce an order of the Board issued against respondents The Grease Company (herein "Grease Company") and Theatre Now, Inc. (herein "Theatre Now").

The Board's original decision and order (A. 277-286)[1] is reported at 211 NLRB 525. On December 3, 1974, this Court granted respondents' motion to reopen the record and additional evidence was taken which resulted in the Board's supplemental decision and order (A. 288-290) reported at 221 NLRB No. 182. This Court has jurisdiction of the proceedings since both Grease Company and Theatre Now transact business and have offices in New York City.

I. THE FACTS

A. Introduction

Grease Company is a New York limited partnership engaged in the production of the musical play "Grease" for exhibition to the general public throughout the United States and Canada (A. 3). Theatre Now, among other things, manages theatrical productions of musical or dramatic shows (A. 4; 159). Ken Waissman, the general partner of Grease Company, and Maxine Fox Waissman (referred to as Miss Fox) created and produced the show "Grease" and hired Edward Davis, a stockholder in Thea-

1. "A" references are to the printed appendix.

tre Now, as their general manager (A. 4-5; 183, 196, 215). While the show was running in New York, a road company was formed which, beginning in December, 1973, presented the show in other cities. Davis, as general manager of Grease, hired Doucette as the carpenter and, on Doucette's recommendation, hired Doucette Jr. as the carpenter's assistant or flyman (A. 5-6; 63-64, 160-163). The road company opened in Boston and played in a number of cities reaching Toronto in April, 1973 (A. 268).

B. Events in Toronto leading to the decision to discharge the Doucettes

On April 18, Miss Fox, production supervisor Thomas Smith and choreographer Patricia Birch arrived unannounced in Toronto and attended the matinee performance of the show (A. 15; 170, 201, 230). Miss Fox was very upset about the physical condition and appearance of the show. Among other things, the props and scenery were inadequately maintained, some of the scene changes were slow, the masking was insufficient, one of the panels had a crack which was visible to the audience and at least one of the important panels was not hung at all (A. 16-17; 170-171, 202, 232). After the performance, Miss Fox discussed her feelings with company manager Donald Antonelli and the new production stage manager Frank Marino. She also inquired as to Doucette's whereabouts and was told he had been in Detroit for a couple of days doing advance work and would probably return the next day (A. 17-18; 202-203, 233-234).

Miss Fox was very angry about the poor condition of the show and, although not all the problems with the show were attributable to Doucette, she called Waissman that evening and told him that the indications were that Doucette had not hung the show properly. When Waissman heard this he said he wanted Doucette fired immediately.

Miss Fox then called Davis and told him what had transpired and that she and Waissman wanted Doucette fired immediately. Davis said he thought it would disrupt the show, attempted to calm down the Waissmans and arranged a meeting for the following Monday to discuss the situation (A. 29-30; 173-174, 203-206, 208-209, 219-221).

On Monday, April 23, a meeting was held among Miss Fox, Waissman, Davis and Smith. The Waissmans insisted that Doucette was to be fired immediately because they felt he was to blame for the shoddiness of the show. Davis told them that it was almost impossible to replace a carpenter on such short notice and that the show would be disrupted if Doucette was fired at that time. He recommended that the discharge be effectuated in Los Angeles where the show had a long run and where they could find a replacement for Doucette. It was finally agreed that Doucette would not be discharged until the show reached Los Angeles (A. 175-176, 209-210, 221-223). Smith, who left the meeting before the final decision was made, testified to the general discussion at the meeting about the dissatisfaction with Doucette (A. 237-239).

Marino's testimony, taken after the Court ordered the record reopened, substantially confirmed the testimony of Miss Fox, Waissman, Davis, and Smith. Marino joined the show during its last week in Washington and made the move to Cleveland while the former stage manager was still with the show. Toronto, where Miss Fox, Ms. Birch and Smith viewed the show on April 18, was the first city that Marino was on his own (A. 320-321, 332). Marino related that Miss Fox was "upset and unhappy" about the condition of the show and that she and Smith considered Doucette responsible. Marino candidly testified that he felt Doucette was not responsible for the deficiencies but that his explanation of the situation was not accepted, apparently because he was so new on the job (A. 302; 329-331).

As a result of Miss Fox's feelings, the deficiencies in the performances were corrected by a brush-up rehearsal, work on costumes by the wardrobe director and a paint call (A. 332, 357).

Mr. Antonelli's testimony regarding Miss Fox's dissatisfaction in Toronto and the subsequent paint call also confirmed the testimony of the other witnesses (A. 312; 361-362).

Marino did not think Doucette was a good carpenter because he felt Doucette tried to do as little as possible and did not have the proper attitude and responsibility towards his work. While Smith was in Toronto, Marino had expressed his feeling to Smith that he did not like Doucette's attitude (A. 304; 333-334). Then, during the Detroit run, prior to the grievance meetings held in Cincinnati which are discussed below, Marino had a long meeting with Waissman regarding the problems the show was having. At this meeting Marino asked that Doucette be fired because of Doucette's absences and the general sloppiness of his work. Waissman told Marino that Doucette was going to be replaced at a convenient time but that he had to discuss the matter with Davis so as not to jeopardize the show with the important Los Angeles opening coming up very soon. Marino was not told an exact date when Doucette would be discharged but he left the meeting knowing that Doucette was going to be discharged (A. 304-305; 225, 333-335, 353). Near the end of the Detroit run, on May 23 or 24, a week before the grievance meetings in Cincinnati, Marino told Smith, who was in Detroit to rehearse a new leading lady into the show, that Waissman had told him that Doucette was going to be discharged (A. 305; 245-246, 339-340).

C. The Weeden grievance meetings

The Doucettes were discharged in Los Angeles on June 17, 1973 (A. 25; 71, 128, 150), consummating the decision

the Waissmans and Davis reached at their meeting on April 23.[2] The Board found that the actual reason for the discharges related to Doucette's attendance at grievance meetings held in Cincinnati between May 29 and June 2, 1973, to discuss the discharge of soundman Bob Weeden. The grievance meetings were attended by Marino, Antonelli, Weeden, Doucette and Vignale, the Union's business representative, and the terms of Weeden's discharge were resolved with little difficulty. Doucette, who hardly spoke at the grievance meetings, was in attendance because the head carpenter acted as shop steward (A. 22-24; 66-70, 141-145, 147, 340, 351-352).

Prior to the last grievance meeting, Doucette commented to Vignale that he did not want to attend because he was afraid he would be fired. When asked why, after attending two meetings, he was suddenly afraid he would be fired, Doucette said: "my feeling was that after the opening night in L.A., I wasn't needed anywhere." He told Vignale "If I go in here with you . . . after the opening in L.A., I'm going to get fired" (A. 24; 121-123). Doucette also told Marino in Denver, subsequent to the Weeden incident, that he would probably be discharged in Los Angeles (A. 341, 353-354).

D. The discharges of the Doucettes

The Doucettes were discharged on June 17, during the first week of the show's run in Los Angeles, when Antonelli called Doucette into his office and told Doucette he and his son had to be let go. Antonelli testified that Davis had often expressed his displeasure with Doucette and wanted to get rid of Doucette prior to the Weeden incident (A. 309; 363-364, 372). Davis was concerned about Doucette's

2. It appears that Doucette, Jr. was not specifically discussed at this meeting because the Doucettes were considered a team (A. 190-191, 223).

expenditures and finally discharged the Doucettes after learning that Doucette quoted a higher price for certain material than originally quoted by the house carpenter at the Los Angeles theatre (A. 377, 382-384). Doucette asked why he was being discharged and Antonelli said he was told to do it by Davis. Doucette asked if it would be all right to call Davis and Antonelli said he wished Doucette would (A. 25; 70-71).

The next day Doucette telephoned Davis seeking an explanation for his and his son's discharges. In the only directly conflicting testimony in the case, Davis testified that when Doucette asked why he had been given notice Davis told him that "the producers have not been happy for a long time" (A. 28; 180-181). Doucette's version of the telephone conversation was that Davis gave as the reason for the discharge that he "was mad at (Doucette) for bringing the IA representative into Cincinnati" (A. 28; 71-72). Later on in his testimony Doucette repeated that but added "that was causing (Davis) troubles and that (he) should never have got into that part of it" (A. 28; 128-129). When Doucette asked why his son was fired Davis, according to Doucette, responded, "because he is your son . . . I was going to fire you in Cincinnati, but I needed you for the opening in L.A., but now I don't need you" (A. 28; 71).

II. ARGUMENT

A. Substantial Evidence on the Record as a Whole Demonstrates that Doucette was a Supervisor as Defined in the Act and, Therefore, Respondents did not Violate the Act by Discharging Doucette

1. *Doucette was a supervisor as defined in the Act.*

The Administrative Law Judge, based on the facts presented in the original decision, concluded that Doucette was a supervisor under the Act (A. 35-37). The Board, how-

ever, reversed that determination based, as we show below, on erroneous reasoning (A. 278-279), and the Administrative Law Judge, in the supplemental decision, made the interesting finding that if the facts presented at the second hearing were presented at the first hearing, she would not have found Doucette to be a supervisor (A. 313). It is submitted that the totality of evidence supports the conclusion that Doucette was a supervisor.

The term supervisor as defined in Section 2(11) of the Act is:

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibily to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Board has regularly held, particularly when attributing the remarks of an individual to the employer in an unfair labor practice case, e.g., *Pacific Southwest Airlines,* 201 NLRB 647, 649-650 (1973); *Duvernoy & Sons, Inc.,* 177 NLRB 538, 539 (1969); *Redwing Carriers, Inc.,* 165 NLRB 60, 62-64 (1967), that the presence of any one of these powers is enough to qualify an employee as a supervisor; and that has become the accepted rule. E.g., *N.L.R.B. v. Gray Line Tours, Inc.,* 461 F.2d 763, 764 (9th Cir. 1972); *N.L.R.B.* v. *Metropolitan Life Ins. Co.,* 504 F.2d 1169, 1173 (2d Cir. 1968). While the Board's brief concedes that the supervisory functions are listed in the disjunctive in the Act, the brief conveniently ignores the facts which demonstrate that Doucette met several of these tests and clearly qualified as a supervisor.

The most significant indicia of supervisor was the work actually performed by Doucette. He was required to make an advance trip to each new city for the purpose of "laying out" the show in the theatre in that city (A. 37; 88-90, 320). As Doucette testified, "(E)very theater is different. It's up to me to decide where I can put the show to make it work" (A. 89). If the carpenter runs into any problems, he makes the decision "on the spot" (A. 322). Doucette, as head carpenter, is the only member of the touring company present at the advance call. It is at this time that the local stagehands hang the rigging, at Doucette's direction, in preparation for the show's arrival (A. 90-91, 323-324).

Moreover, Doucette was the head of the carpentry department and the boss of the local carpenters, telling the men as the show came into each city how to remove the scenery from the trucks and where to put it (A. 37; 88-90, 95-96). Doucette was responsible for dismantling and rehanging the show in each city. He organized the work crews, assigned the work and made sure that the packing, loading and cleaning up was done properly by actually directing the work while it was being performed (A. 323-324). Indeed, the Administrative Law Judge specifically found that "Doucette would go directly to the local carpenters to show them how and where the scenery was to be hung" (A. 313). It is plain that what Doucette did was "responsibly to direct (employees) . . . requiring the use of independent judgment," and as such he was a supervisor under the Act. Furthermore, not only did Doucette assign work to employees and direct the work as it was performed but Doucette was looked upon as the head of all the departments (A. 347), considered himself a "boss" of the employees (A. 89) and was considered a supervisor by Marino, the stage manager (A. 328).

An analysis of the Board's decision demonstrates its own inconsistency in its findings. Thus, the Board finds that "(a)ny *direction* or *instruction* by Doucette, Sr., is attributable essentially to his familiarity with the operation of the show," but then goes on to find that Doucette's job "*did not require actual supervision of or direction* of stagehands as they performed their jobs" (A. 279) (emphasis added). It is submitted that the undisputed facts demonstrate that Doucette actually supervised and directed stagehands as they performed their jobs in rigging, dismantling and rehanging the show. Indeed, it was specifically found that Doucette would show the local carpenters "how and where the scenery was to be hung" (A. 313). Moreover, the fact that supervision is attributable to familiarity applies to most supervisors and does not detract from but supports Doucette's status as a supervisor. It is obvious that the Board was straining to reach a result because of its understandable dissatisfaction with the theory of the violation found by the Administrative Law Judge.

Another indicia of supervisor is the head carpenter's role in establishing the number of local stagehands needed in each department to fill the yellow card which determines how many stagehands will be employed in each city on the tour. Doucette, the carpenter, told Antonelli, the company manager, how many employees were needed and that was the number used on the yellow card for each city (A. 314; 135, 360). Thus, Doucette, using independent judgment, effectively determined the number of employees that were to be hired in each city. In attempting to refute Doucette's status as a supervisor, the Board's brief (p. 24) relies on the original Board decision that Doucette's participation in hiring local stagehands was "minimal and devoid of independent judgment." However, in the supplemental decision adopted in full by the Board, the Administrative Law Judge specifically found that an independent judgment had to be made in each city on the tour (A. 314).

Finally, and, by itself, admittedly of minor significance, Davis relied on Doucette's recommendation in hiring Doucette Jr. as the flyman sight unseen (A. 36-37; 132, 162-163). It is true, as the Board pointed out (A. 278), that the flyman recommended was Doucette's son and that the employer considered them as a team. It is submitted, however, that since the head carpenter and flyman are required to function as a team, as the Board noted, the power of the head carpenter to effectively recommend the flyman *is* an example of a supervisor's power of "effective recommendation."[3] In fact, Davis asked Doucette if he could get an assistant and that is when Doucette recommended his son (A. 162). The Doucettes were the carpenter and assistant carpenter. It was important that the carpenter and his assistant work well together and it was usual, therefore, to permit the carpenter to recommend his assistant just as Doucette had done (A. 132).

The Board's argument (p. 22-23) does not really analyze the facts but, in essence, adopts the posture that "the Board can do no wrong." Thus, it is even more imperative for this Court to examine carefully the Administrative Law Judge's findings and reasonings of the supplemental opinion, all of which were adopted by the Board.

The Administrative Law Judge's statement that had the evidence at the second hearing been presented at the first hearing she would not have found Doucette to be a supervisor under the Act is a glaring example of the Judge's result-oriented approach in this case. The finding that "Doucette was acting as a highly skilled craftsman who made mechanical and quasi-artistic judgments with respect to equipment rather than employees" follows almost immediately her finding that "Doucette would go directly to the local carpenters *to show them how and where the scenery*

3. The statement in the Board's brief (p. 23) that Doucette's recommendation of his son did not serve "the interest of the employer" does not warrant a response.

was hung" (A. 313-314) (emphasis added). No special "equipment" was used that local carpenters were not familiar with. It is thus difficult to understand why Doucette's alleged skill as a craftsman militates against the fact that he personally directed the local carpenters in each city how and where to put the scenery.

The shortcomings of the Administrative Law Judge's decision, which was adopted by the Board, are crystallized in point 3 of Section B (A. 314-315). The Judge finds Marino's testimony that he believed Doucette to be a supervisor credible but diminished by his testimony that he was not surprised at Doucette's presence at the Weeden grievance. Indeed, one of the main points of this part of the Board's brief (p. 23) is that Marino's statement that Doucette was a supervisor is "negated by his own testimony that he viewed Doucette as the shop steward" to protect fellow employees. The inference here is that Marino, the production stage manager, was aware that under the Act there is a distinction between supervisors and employees. This type of inference permeates both decisions in this case and demonstrates the failure of the Administrative Law Judge and the Board to view the theatrical setting involved herein. Everyone is organized in the theatre and such nuances of the Act are not given very much thought. Rather, Marino's testimony (confirming the testimony of every other witness on this point) that Doucette's presence was his responsibility as shop steward (A. 314-315; 340) should have lead the Board to the conclusion that Doucette's presence at a grievance meeting could not possibly have been the reason for his discharge.

It is submitted that the facts support respondents' position that Doucette was a supervisor as defined by the Act and that, for the reasons set forth, the Board's finding that he was an employee is not substantiated by the evidence.

2. *Doucette's discharge as a supervisor was not a violation of the Act*

Since, as we have shown, that Doucette is a supervisor, it follows that Doucette's discharge is not a violation of the Act.

Prior to 1974, the Board, with court approval in some instances, held that where the discharge or discipline of a supervisor directly infringes upon the statutory rights of employees, the action may constitute an unfair labor practice. However, the Supreme Court, in *Beasley* v. *Food Fair, Inc.*, 416 U.S. 653 (1974), has declared that it is not a violation of the Act for an employer to discharge supervisors because of their union membership. If the Act does not protect supervisors from discharge because of their membership in a union, an action vis-a-vis supervisors which would have the greatest impact on the statutory rights of employees, then discharging a supervisor for attending a grievance meeting (a factual allegation which we will demonstrate did not occur in this case) does not violate the Act.[4] Thus, as a result of the Supreme Court's decision in *Beasley, supra,* the discharge of Doucette, a supervisor under the Act, could not be a violation of Section 8(a)(3) or 8(a)(1) of the Act.

B. Substantial Evidence on the Record as a Whole Supports Respondents' Position that the Doucettes were Discharged for Reasons Unrelated to Doucette Sr.'s Attendance at Grievance Meetings

1. *The discharge of Doucette was unrelated to his attendance at grievance meetings*

In this case, which essentially involves a single Section 8(a)(3) violation, the Administrative Law Judge has, in

4. The Court, 416 U.S. at 657-658, cited favorably, among other cases, *N.L.R.B.* v. *Fullerton Publishing Co.*, 283 F.2d 545, 551 (9th Cir. 1960), wherein was stated: "as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice" under the Act.

two decisions, written nearly 60 pages in an attempt to justify the result. Throughout the proceedings, however, the Judge and the Board, have not only ignored the mass of uncontradicted evidence, but have also ignored the essential fact that the events occurred in the legitimate theatre and not in an industrial setting. As we shall demonstrate, when all the facts are considered, particularly in the context of the legitimate theatre, it becomes apparent that no violations of the Act occurred and that the complaints should be dismissed.

Despite the uncontroverted testimony of respondents' witnesses, the Administrative Law Judge and the Board concluded, based on the failure of Marino and Antonelli to testify at the first hearing, that Doucette was discharged for attending grievance meetings relating to the discharge of sound man Bob Weeden (A. 17, 18, 19, 20, 25, 26, 27, 33). When this was brought to the attention of the Second Circuit Court of Appeals, respondents' motion to open the record for the purpose of having Marino and Antonelli testify was granted.

Although the testimony of Marino and Antonelli substantially corroborated the testimony of respondents' witnesses at the first hearing, the Administrative Law Judge, in a supplemental decision adopted in its entirety by the Board, corrected some of the factual findings made in the first decision, but affirmed her original conclusions by drawing incorrect inferences from the testimony. For example, the Administrative Law Judge persists in discrediting Davis' testimony regarding the reason for Doucette's discharge because of his alleged testimony that "he had never told Doucette that the producers were dissatisfied with his work" (A. 298). The Judge set forth Davis' testimony which clearly demonstrates that she was using testimony regarding occurrences in April to support an alleged occurrence in June.

Furthermore, the Administrative Law Judge inferred "from the probabilities of the situation" that Smith relayed to Miss Fox Marino's explanation of why the Edsel panel was not used in Toronto and that Doucette was not responsible for the defects in the scenery including the park flat and the palm trees (A. 300-302). There is no evidence in the record that Smith so advised Miss Fox nor do "the probabilities of the situation" warrant such a conclusion. Smith knew that Miss Fox was very upset about the way the show looked, had blamed Doucette for the defects and did not blame Marino because he was too new with the show. The probabilities are that Smith said nothing to Miss Fox about Marino's view of the situation because he felt Marino was too new to be able to make such a judgment and because he knew how Miss Fox felt about the matter.

Another example of the drawing of an incorrect inference in order to bolster the result is the finding that when Waissman told Marino he would act on Marino's recommendation that Doucette be discharged, Waissman did not intend to discharge Doucette but was merely pacifying Marino (A. 306). There is no basis in the record for such an assumption; in fact, Marino, who is found to be a totally credible witness (A. 302, 303, 314), and whose testimony is credited when inconsistent with the Doucettes (A. 300), testified that when he left Waissman he knew Doucette was going to be discharged (A. 353). Indeed, Marino specifically confirmed the previous testimony that he was told with the big L.A. opening coming up, the show could not be jeopardized by the immediate discharge of the carpenter (A. 335). The Administrative Law Judge in order to adhere to her original decision was compelled to draw this inference because in the first decision she discredited Waissman's testimony on the ground that Marino failed to testify and because Marino had indicated his surprise at Doucette's discharge (A. 33). Now that Marino has testified he was told by Waissman,

before the Weeden grievance meetings, that Doucette was going to be discharged, and has explained his "surprise" to the satisfaction of the Administrative Law Judge, the Judge had no choice but to draw the inference that Waissman was only "pacifying" Marino and conclude that Marino's explanation of "surprise" does not help respondents because it was based on the May 17 discussion with Waissman (A. 306-307). The Judge's attempt to fit the facts to support a conclusion is apparent.

Although credibility resolutions are usually best resolved by the trier of facts, it is apparent from these examples that the Administrative Law Judge was straining in the supplemental decision to reach the findings made in the original decision which were based almost entirely on the failure of Marino and Antonelli to testify. An analysis of all the testimony demonstrates that the Waissmans were seriously concerned about the condition of the show in Toronto, blamed Doucette for certain deficiencies, wanted him fired immediately on April 23, and agreed, only at the urging of Davis, to delay his termination until the show reached Los Angeles.

Perhaps Miss Fox and Smith were overstating Marino's complaints as of the Toronto date (A. 18-19, 303), but they were not overstating their dissatisfaction with the show. Persons active in the legitimate theater, particularly producers, are creative, volatile individuals. A show's producers must raise a considerable amount of money on the basis of an idea and the result of their efforts is a creation of their will. Any mistreatment of their creation is considered a personal insult which cannot and will not be tolerated. Thus, once a decision is made and fault assessed, it is almost impossible to shift the blame or responsibility even though it may be misplaced.

Miss Fox, one of the producers, was terribly upset about the condition of the show as she viewed it in Toronto and she expressed that unhappiness to Marino and Antonelli.

Rightly or wrongly, Miss Fox blamed Doucette for the deficiencies and Waissman, her husband and co-producer, upon learning of this wanted to fire Doucette immediately. The reaction of the producers, who consider the show part of themselves, is perfectly understandable. However, Davis, the general manager and the man concerned with the actual operation of the business aspects of the show, prevailed upon the Waissmans not to jeopardize the show and to wait for an appropriate time to let Doucette go. Thus, it was decided on April 23 to terminate the Doucettes after the show was set up in Los Angeles.

Whether or not Doucette was actually to blame for the shoddiness of the show is not the issue. The real issue is whether or not Waissman and Fox believed or had reason to believe that he was. All of the incidents described did occur and the evidence is clear that they (Waissman and Fox) believed Doucette was at fault. The Administrative Law Judge's repeated references and findings as to whether or not certain occurrences were or were not the fault of Doucette is totally immaterial. It is apparent that the producers were not concerned with the union activities of the personnel staging or acting in the show. They were concerned about the fact that the show was shoddy, and in their minds Doucette was to blame. This was the reason for Doucette's discharge, not his attendance at grievance meetings.

Furthermore, Waissman, and probably Miss Fox as well, did not know that Doucette participated in the grievance meetings (A. 213, 225). It can be stated without contradiction that if the Waissmans were satisfied with the show they would not jeopardize its future by terminating the head carpenter for the reason found by the Board, *i.e.*, attendance at union grievance meetings, or for any similar reason. It is submitted that the most significant aspect of the Weeden incident is Doucette's statement to Vignale

that he did not want to attend the final grievance meeting because he was afraid he would be fired in Los Angeles.[5] It is evident that Doucette must have learned that he was going to be terminated in Los Angeles and he was trying to insulate himself from discharge. There is no other explanation for Doucette being able to relate precisely the decision that had already been reached by Miss Fox, Waissman and Davis. However, it is well settled that merely engaging in protected union activity does not immunize an employee from discharge for justifiable reasons. E.g., *N.L.R.B. v. Ogle Protection Service, Inc.*, 375 F.2d 497, 505 (6th Cir. 1967) and cases cited therein.

Before concluding this point, the letter written by Joel Arnold, attorney for respondents, requires explanation (A. 26-27). Antonelli's testimony regarding the reason for the Doucette's precipitous discharge puts the letter in its proper perspective. The "suspicion of wrongdoing" referred to in the letter obviously relates to the "black legs" or "velour" incident in Los Angeles. As Antonelli testified, the house carpenter gave him one price for material and Doucette gave him a higher price. When Antonelli advised Doucette of the discrepancy, Doucette said the house carpenter was mistaken; when Antonelli spoke again to the house carpenter, the price quoted was the higher price. Davis viewed this as the "final straw" and, since the show had opened in Los Angeles, he told Antonelli to get rid of the Doucettes immediately (A. 384). Thus, although wrongdoing could not be proven, the suspicion existed. It accounts for the statement in Arnold's letter and explains why the Doucettes were not given two weeks' notice. It is evident that both Arnold and Davis were reluctant to go into this matter without positive proof because they were afraid of being accused of libel. This also explains

5. Doucette also told Marino that he was afraid he would be fired in L.A. because he was not needed (A. 341).

Antonelli's statement to Doucette that he did not know why Doucette was being terminated (A. 310).

It is against this setting that Davis' alleged statement that Doucette was discharged for attending grievance meetings must be judged. Davis would have no reason to make such a statement to Doucette but he would have reason to tell Doucette that the producers were unhappy with Doucette for a long time, as they were. Indeed, it was only because of Davis that Doucette remained on the job as long as he did (A. 173-174). In sum, it was improper for the Board to have "credited the testimony of a highly prejudiced and interested witness and discredited the testimony of all witnesses to the contrary." *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 426 (6th Cir. 1964). See also *N.L.R.B.* v. *Ogle Protection Service, Inc., supra,* 375 F.2d at p. 505-506.

2. *The discharge of Doucette, Jr. was not a violation of the Act*

If Doucette's discharge was lawful, as we believe it to be, the discharge of Doucette, Jr. was also lawful because he was not discharged for his father's alleged Union activity, but because father and son were considered a team (A. 278; 191, 223). The fact that Waissman barely recalled Doucette, Jr. being mentioned at the meeting is consistent with the fact that the Doucettes were considered a team.

It is apparent that Doucette, Jr. was discharged as flyman because he and his father were considered a team, and no other reason has ever been given by respondents or by their witnesses throughout these proceedings. Doucette, Jr.'s abilities were not considered in reaching the decision to discharge him, but as indicated above, and as stated throughout, Doucette, Jr. was discharged because he was Doucette's son and the Doucettes were considered a team at time of hire and at time of discharge. Footnote 12 of

the Administrative Law Judge's supplemental decision (ALJSD 13) is but another example of picking through the record in order to support a weak case. Respondents' position that the decision to discharge the Doucettes was made on April 23 has been consistently accompanied by the explanation that the Doucettes were considered a team and that Doucette, Jr. was discussed "hardly, if at all," on April 23.

Doucette, Jr. was discharged as flyman because he and his father were considered a team; when Doucette was terminated, Doucette, Jr. was also terminated. Since Doucette Jr.'s discharge was unrelated to union activities, the discharge was not a violation of either Section 8(a)(1) or 8(a)(3) of the Act.

For all these reasons, the complaint charging the respondents with violating Sections 8(a)(1) and (3) of the Act by discharging the Doucettes should be dismissed.

C. Based on the Substantial Evidence on the Record as a Whole Grease Company and Theatre Now are not Joint Employers Under the Act

Although the question of whether respondent Theatre Now is a joint employer or not is academic in this case, the point must be mentioned in this brief. The record is clear that Davis, not Theatre Now, was hired by the Waissmans as general manager of the show (A. 183). That Davis was a vice-president and a stockholder of Theatre Now (A. 48; 159, 183) is not relevant to a determination of the status of Theatre Now as an employer of the Doucettes. Nor is it relevant that Davis' salary is paid by Theatre Now (A. 48). What is significant is that Davis personally, as noted above, not Theatre Now, was hired by the Waissmans to be general manager of the show. The Waissmans' relationship was with Davis, who was employed by Grease Company, not with Theatre Now as would be the case where Theatre Now was hired as the general manager of a show.

The definition of "employer" in Section 2(2) of the Act, serves to make Grease Company responsible for Davis' actions as its agent, which is readily conceded; in no way does this Section make Theatre Now an employer of the Doucettes. There is no evidence in the record by which Theatre Now becomes an employer due to its relationship with Grease Company nor is there any evidence that the Waissmans had any relationship with Theatre Now, other than the fact that Davis' salary check, at his request, was sent directly to Theatre Now. Moreover, the other evidence to support the conclusion that Theatre Now was a joint-employer is noticeably weak. Doucette's naming of Theatre Now as respondent and laid-off employees (in other cases) seeking unemployment compensation from Theatre Now are facts that do not prove anything, let alone that Theatre Now is a joint-employer. Davis was the only person connected with Theatre Now who provided any services to Grease Company and every finding with respect to Theatre Now is based on Davis who, as we have noted earlier, personally was hired by the Waissmans as general manager for the show.

Considering the evidence in the record, it must be concluded that respondent Theatre Now was not a joint-employer of the Doucettes and should be removed as a respondent in this case.

III. CONCLUSION

For the foregoing reasons, it is respectfully submitted that enforcement of the Board's order should be denied in its entirety.

Respectfully submitted,

BATTLE, FOWLER, LIDSTONE,
JAFFIN, PIERCE & KHEEL

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Of Counsel:
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New York, New York
September, 1976

UNITED STATES COURT OF APPEALS
for the Second Circuit

76-4087 74-2396

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE GREASE COMPANY AND THEATRE NOW, INC.
Respondents.

On application for enforcement of an Order of The National Labor Relations Board

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Sol Saginaw , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 1641 Third Avenue , in the Borough of Manhattan , City of New York. On the 1st day of September 1976 , at 10:00 o'clock a.m.

I served 3 copies of the

BRIEF FOR THE GREASE COMPANY and THEATRE NOW, INC.

in the above-entitled action on:

The National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570
Attn: Eliot Moore
Deputy Assistant General Counsel
Enforcement Division

the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Sworn to before me this
1st day of September, 1976

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1977